BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURT BELOW.

The judgment or opinion of the Court of Appeals has not been reported. It was brief, was entitled a judgment, but may be also interpreted as an opinion, since it referred to the facts, to the contention of petitioner, to the general law, to the statutes of Tennessee, and to Tennessee cases (R. 509, 510).

GROUNDS ON WHICH JURISDICTION INVOKED.

Petitioner invokes the jurisdiction of this Court on the ground that the Tennessee or local law was not applied in the case, on the ground that one of the two conclusions in the case was in conflict with a decision of another Circuit Court of Appeals on the same matter, and on the ground that one of the two conclusions in the case is in conflict with a decision of the Sixth Circuit Court of Appeals on the same matter.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for writ of certiorari and in the interest of brevity are not repeated here. Reference will be made to such facts, on the points involved, in the course of the argument which follows.

SPECIFICATION OF ERROR TO BE URGED.

The Court of Appeals for the Sixth Circuit in its judgment affirming the District Court and in the opinion expressed in said judgment filed in this cause on October 8, 1942 (R. 509, 510) erred:

(1) Because said judgment is in conflict with an applicable local decision on the question arising under the Sales Act of Tennessee, said Court having held that a purchaser of gasoline who accepts a quality claimed to be inferior, with knowledge of inferiority, may recover enhanced damages arising out of loss of customers to whom the gasoline was sold, this conclusion being in direct conflict with the law of Tennessee as expressed in the case of *Lamborn & Co.* v. *Green & Green,* 150 Tenn. 38.

(2) Because said judgment was in conflict with an applicable local decision on the question arising under the claim for damages growing out of fraud and deceit, said Court of Appeals holding that continuing relationships with and securing concessions from a lessor who deceived a lessee as to the true facts about sales of gasoline through a group of stations is liable in damages, although the lessee promptly discovered what were the true facts, continued to operate the stations, and secured concessions with respect to the rental thereof. The Court of Appeals failed to apply the Tennessee case of *Wells* v. *Holley,* 145 Tenn. 345, in which the Supreme Court of Tennessee held in an elaborate opinion that damages cannot be recovered when one induced to agree by fraud becomes aware of the fraud and continues to recognize and operate under the agreement.

(3) Because said judgment was in conflict with the opinion and decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Phillips Petroleum Co.* v. *Rau Construction Co.,* 130 F. 2d 499, in which that Court of Appeals had under consideration a suit for damages for fraud and deceit wherein the party alleging deceit had continued business relationships with the alleged wrongdoer and negotiated and secured concessions with respect to the matter involved, said Court holding that the unanimous rule is that recovery cannot be had under such circumstances; and the judgment complained of is

also in conflict with another opinion and decision of the Court of Appeals for the Sixth Circuit in the case of *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 52 L. R. A. 745.

The argument being concise, and the specification of errors summarizing the argument, a further summary of the argument is deemed unnecessary and, in the interest of brevity, omitted.

ARGUMENT.

Directly and concisely stated, this case calls for an exercise of this Court's power of supervision for the following reasons:

1. In that aspect of the case grounded upon the insistence damages should be recovered because gasoline of a quality inferior to that specified in the contract was delivered and on that account the respondent suffered damages by reason of loss of customers, the Court of Appeals failed to apply the Tennessee law. The Court of Appeals failed to apply the rule laid down by the Supreme Court of Tennessee in the case of *Lamborn & Company* v. *Green & Green,* 150 Tenn. 38. In this case the Supreme Court of Tennessee construed the Sales Act which had been recently adopted in Tennessee, and so the references in the report are to the Acts of Tennessee. This is the same provision, however, that was subsequently carried into the Code of Tennessee effective in 1932. That portion of the section and the sub-section which is pertinent and which was construed by the Supreme Court in this case reads as follows:

> "Sec. 7262. *Remedies for Breach of Warranty.*
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> "(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the value of the goods at the time of delivery to buyer and the value they

would have had if they had answered to the warranty."[1]

The Supreme Court of Tennessee in construing the Tennessee statute was dealing with a case in which sugar had been sold. The purchaser found that the sugar did not answer to the warranty and so advised the seller. Notwithstanding this knowledge, the purchaser used the sugar. Under this state of facts the Supreme Court held:

> "Although the *purchaser* promptly informed the *seller* that an attempt to use this sugar in the manufacture of *purchaser's* goods would be disastrous, nevertheless the *purchaser* proceeded to do that very thing. Certainly the *purchaser* could not have a recovery for the enhanced damages they sustained by reason of the experiments made with this sugar, in view of *the purchaser's* appreciation of the probable results" (p. 51).[2]

Nothing is plainer than that the respondent, the purchaser of the gasoline in question, takes the position that when deliveries of the gasoline were made, the respondent had full knowledge of the quality of the gasoline.[3]

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[1]This quotation has been slightly changed, *complainant* and *defendant* indicating *seller* and *purchaser*. The words substituted are in italics. The head-note in the case reads as follows:

> "9 - SALES. *Buyers using sugar after informing sellers that attempt would be disastrous cannot recover enhanced damages from so doing.* Buyers using sugar purchased in manufacturing their goods after promptly informing sellers that such attempt would be disastrous cannot recover enhanced damages sustained by reason of experiments (*Post* pp. 51, 52)."

[2]The entire section is set out in the Appendix in order that its provisions may be seen in the relation intended.

[3]The testimony of E. K. Magrath with respect to this is clear and unequivocal. His company knew each time it secured gasoline that it was not what it should be. It deliberately accepted the gasoline and used it, and, if it was inferior, misrepresented it to the trade. The claim is that customers were lost in this way. His testimony with respect to this is as follows:

Under these circumstances the case of *Lamborn & Co.* v. *Green & Green* should have been applied to the facts of the case, as it construes a statute of Tennessee and therefore the Court of Appeals was in error.

2. In that aspect of the case grounded upon the insistence that the execution of the lease was induced by fraudulent representations as to the amount of gasoline sold by the preceding lessee, the Court of Appeals was in error in that its decision is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in the case of *Phillips Petroleum Co.* v. *Rau Construction Co.*, 130 F. 2d 499. The Court of Appeals in dealing with this question held that "conceding the soundness of appellant's contention that a contract may not be rescinded if the contracting party continues to operate under it after knowledge of misrepresentation, this does not preclude him from asserting damages suffered by reason of the misrepresentation for a breach of warranty, and the Tennessee law does not depart from the general rule in this respect." Your petitioner set up no contention with respect to the rescission of the contract, but stood alone on the position that the dealings of the respondent with your petitioner after full knowledge of the misrepresenta-

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X.242. In other words, to put it another way, when you would send your tank wagon out there on South Broad Street to get a load of gasoline, you knew it was going to be gasoline you did not like?

A. Yes.

X.243. What was the attitude of your customers about this gasoline, in this respect, did you make any character of representations to them about the quality of the gasoline they were getting?

A. Any representations to them?

X.244. To your customers, yes, and tell them it was good?

A. Yes, I told them it was equal, jamb up, equally as good as anybody else's in Chattanooga.

X.245. What I mean is, Mr. Magrath, you did not tell them that when you found out it was not, though, did you?

A. Yes, I told them right on (R. 122, 123).

tions[4] were such as to preclude a recovery for damages in a suit for fraud and deceit. The Court of Appeals held that the Tennessee law as to the sale of goods (specifically Code, Sec. 7262) is applicable to and supports the recovery of damages in this case for fraud and deceit in inducing the execution of a lease. The conflict with the Eighth Circuit case we have referred to, *Phillips Petroleum Co.* v. *Rau Construction Co.*, arises out of the fact that in that case the Court of Appeals for the Eighth Circuit held:

> "The authorities are unanimous in holding that, where one has been induced by fraud to enter into a contract and, after discovery of the fraud, enters into an agreement concerning the subject matter of the contract, or demands and receives from the other party any substantial concession in respect to the transaction, he is conclusively deemed to have waived any claim for damages on account of fraud."[5]

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[4]The parties executed a lease for a year (R. 411). Less than thirty days after the lease was made, the Magrath Oil Company complained of alleged deceit in inducement (R. 42). Having knowledge, it paid rent six months (R. 48). Then at the request of the Magrath Company the lessor reduced the rent $200 per month beginning in September, 1938 (R. 48). The Magrath Company then paid the adjusted rental for September and each month thereafter. Under its terms, the one year lease renewed March 1, 1939 (R. 412), and the Magrath Company paid the fixed rental from March to June or July (R. 51). Finally, after performing, then securing a concession, then paying the adjusted rental, the Magrath Company, without any intimation of suit, about fifteen months after the signing of the lease, secured another modification making the rental one cent a gallon (R. 51). Three months later, in October, 1939 (R. 3), this suit was brought although during the period of over eighteen months the Magrath Company had executed three different notes payable to the Arkansas Fuel Oil Company for obligations (R. 20 and 25).

[5]The full quotation is as follows: "*The authorities are unanimous* in holding that where one has been induced by fraud to enter into a contract and, after discovery of the fraud, enters into an agreement concerning the subject matter of the contract, or demands and receives from the other party any sub-

Furthermore, the action of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Sixth Circuit in the case of *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 52 L. R. A. 745.[6]

3. The Court of Appeals failed to apply the local or Tennessee rule of law with respect to tort actions for fraud and deceit, and the recovery of damages therefor. This rule in Tennesse is found most fully expressed in the case of *Wells* v. *Holley*, 145 Tenn. 345, *an action for damages for deceit*, not rescission. The Supreme Court of Tennessee in that case refered to, relied upon, and practically adopted the opinion in the case of *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 52 L. R. A. 745.[7]

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stantial concession in respect to the transaction, he is conclusively deemed to have waived any claim for damages on account of fraud. * * * The rule has been held to apply although the party claiming the fraud remains silent concerning it in the negotiations in which the amendment to the contract or a concession in his favor is secured. 24 Am. Jur., Sec. 214. And in some jurisdictions it is held that a right of action for damages for deceit is waived by a party to an executory contract who continues performance after discovery of the fraud which induced its execution." Tennessee is, according to *Wells* v. *Holley*, one of these.

[6]The last paragraph of the opinion in that case reads:

"When the plaintiff learned, as he did in May, 1895, that the several factories which had been operated by the Rubber Reclaiming Company had not gone out of business of reclaiming old rubber, but were actively prosecuting that business, and in the market, each for itself, competing for waste rubber, he knew the material facts which went to make his case for deceit. By thereafter deliberately proceeding with the execution of the contract, he waived the deceit and affirmed the contract."

[7]Mr. Justice Lurton, who as a judge of the Sixth Circuit Court of Appeals wrote the opinion in this case, had formerly been a justice of the Supreme Court of Tennessee, and no doubt the full quotation of his opinion set out in *Wells* v. *Holley* was the result of this relationship.

In *Wells* v. *Holley* the Court held (p. 349):

"We are aware of the fact that in some jurisdictions carrying out an executory contract does not waive the right to recover damages for fraud and deceit, but in practically all jurisdictions the right of rescission of such a contract is lost where the party carries it out and executes it after knowledge of the fraud. The principle applicable in this case was, we think, clearly stated and applied by the United States Circuit Court of Appeals for the Sixth Circuit in *Simon* v. *Goodyear, etc.*, in which opinion of the Court was delivered by Mr. Justice Lurton, and from which we quote: * * *."

Thereupon the Supreme Court of Tennessee proceeds to quote at length from the opinion of the Court of Appeals.

In the concluding language of this opinion by the Supreme Court of Tennessee, we find that Court giving its approval to the principle applicable to the facts of the instant case.

" 'Where one is induced by fraud, in the form of false representations, to enter into a contract, and afterwards, upon obtaining full knowledge of the fraud practiced upon him, and of all material facts, declines to repudiate it and expressly ratifies it, he can neither rescind nor maintain an action for damages.'

"Upon the foregoing authorities and upon principle we think the acts of the plaintiff in this case constitute a waiver of the alleged fraud, and an abandonment of the claim for damages. At the institution of this suit the plaintiff had paid but $190 of the sum of $2,000 agreed in the contract. It was his clear duty at that time, after full knowledge of the acts of fraud, if there was fraud, to have abandoned the contract and to have brought the proper action for the damage he had then sustained. He cannot insist upon the continuance of a contract covering a long future period and at the same time claim damages for the fraud that induced it.

> "In the language of some of the authorities he must either stop or go on with the contract. It is manifestly unjust that he should be permitted to do both." Page 359.

It is clear without any haziness at all that negotiations were carried on by the respondent in this case, and that in consequence of such negotiations the respondent secured concessions, such as a reduction from $815 a month to $615 a month of the rental, and subsequently succeeded in securing a concession reducing the rental to 1c per gallon, all of this with full knowledge as to the alleged fraud.

Petitioner therefore prays that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit rendered herein on the 8th day of October, 1942, be reversed.

Respectfully submitted,

SIZER, CHAMBLISS & KEFAUVER,
JOHN A. CHAMBLISS, JR.,
JOHN A. CHAMBLISS,
Attorneys for Petitioner.